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No. 91-480

MOTION FILED OCT 16 1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARPENTERS SOUTHERN CALIFORNIA ADMINISTRATIVE CORPORATION,
Petitioner,

v.

EL CAPITAN DEVELOPMENT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court for the State of California

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE SHEET METAL WORKERS TRUST FUNDS OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA, THE AIRCONDITIONING AND REFRIGERATION INDUSTRY TRUST FUNDS, THE SOUTHERN CALIFORNIA PIPE TRADES TRUST FUNDS, THE SHEET METAL AND AIRCONDITIONING CONTRACTORS NATIONAL ASSOCIATION, THE AIRCONDITIONING AND REFRIGERATION CONTRACTORS ASSOCIATION AND THE AIRCONDITIONING SHEET METAL ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Sheet Metal Workers Trust Funds of Southern California, Arizona and Nevada, The Airconditioning and Refrigeration Industry Trust Funds, The Southern California Pipe Trades Trust Funds, The Sheet Metal and Airconditioning Contractors National Association, The Airconditioning and Refrigeration Contractors Association and the Air Conditioning Sheet Metal Association hereby move the Court, pursuant to Supreme Court Rule 36.1, for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari filed on September 16, 1991 in USSC No. 91-480.

In support of this motion, these amici state as follows:

1. This motion is necessitated by the refusal, upon request, of Respondent El Capitan Development Company to give written consent to the filing of a brief by the amici applicants herein. Petitioner Carpenters Southern California Administrative Corporation has consented to the filing of the accompanying brief. Its letter of consent has previously been filed with the Clerk of the Court.

2. The amici curiae include employer associations and employee benefit plans in the construction industry who would be seriously adversely affected were the decision of the California Supreme Court not reviewed and reversed.

3. The Sheet Metal Workers Trust Funds have over 5000 active participants and 3000 retirees, the Southern California Pipe Trades Trust Funds have over 7500 active participants and 5000 retirees and the Airconditioning and Refrigeration Industry Trust Funds have over 1300 active participants and 500 retirees. Each of the individual plans of the Trust Funds are either an employee pension benefit or employee welfare benefit plan under Sections 3(1) or 3(3) of the Employee Retirement Income Security Act, 29 U.S.C. 1002(1) and (3). Each group of Trust Funds includes defined benefit pension plans, defined contribution profit sharing plans, health and welfare plans, and joint apprenticeship committees. These Trust Funds collect hundreds of thousands of dollars annually as the direct result of the filing of mechanics' liens against real property as part of their efforts to collect delinquent employer contributions and literally millions of dollars annually as the result of the threatened filing of such liens to collect delinquent employer contributions.

4. The Sheet Metal and Air Conditioning Contractors National Association, Inc. ("SMACNA") is an international association of employers which represents contrac-

tors for collective bargaining purposes whose members contribute to various pension and health plans around the country. It has over 2000 member contractors in the United States alone. SMACNA has local chapters throughout the United States including several in Southern California, Arizona and Nevada. SMACNA, its local chapters and contractor members are sponsors of and contributors to hundreds of multi-employer benefit plans throughout the United States, including the Trust Fund amici.

5. The Air Conditioning Sheet Metal Association ("ACSMA") is an association of employers in Los Angeles County which represents those employers for collective bargaining purposes. ACSMA members contribute to the Trust Fund amici curiae.

6. The Airconditioning and Refrigeration Contractors Association ("ARCA") is an association of employers in Southern California which represents those employers for collective bargaining purposes. ARCA members also contribute to the Trust Fund amici.

7. The affirmance of the California Supreme Court's decision that state mechanics' lien laws expressly giving trust funds the right to file liens for delinquent contributions on behalf of the covered participants are preempted by ERISA would seriously impinge on the Trust Funds' ability to provide the expected benefits to participants. It would also seriously affect the competitive status of the employers who contribute to these funds. If delinquent contributions cannot be recovered through mechanics' liens, the remaining contributing employers would be required to try to make up the shortfall in necessary contributions, something that is virtually impossible to completely do given the present state of the economy.

It is simply inconceivable that the purpose of ERISA, to provide for "the soundness and stability of plans with respect to adequate funds to pay promised benefits" (29

U.S.C. 1001(a)) can possibly be served by removing the most effective collection remedy that construction industry trust funds have. This Court's failure to consider and ultimately reverse the California Supreme Court's decision below would seriously affect the stability of the Plans because it would jeopardize both the financial soundness of the Plans and the employers who contribute to them.

The amici are in a unique position to advise the Court because of their intimate familiarity with the construction industry and its trust funds and the practice and procedures of the filing of trust fund mechanics liens to collect delinquent employer contributions.

WHEREFORE, it is respectfully moved and requested that these Trust Funds and Employer Associations be granted leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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BRIEF OF AMICI CURIAE OF THE SHEET METAL WORKERS TRUST FUNDS OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA, THE AIRCONDITIONING AND REFRIGERATION INDUSTRY TRUST FUNDS, THE SOUTHERN CALIFORNIA PIPE TRADES TRUST FUNDS, THE SHEET METAL AND AIRCONDITIONING CONTRACTORS NATIONAL ASSOCIATION, THE AIRCONDITIONING AND REFRIGERATION CONTRACTORS ASSOCIATION AND THE AIR CONDITIONING SHEET METAL ASSOCIATION IN SUPPORT OF PETITIONER

The Sheet Metal Workers Trust Funds of Southern California, Arizona and Nevada, the Airconditioning and Refrigeration Industry Trust Funds, the Southern California Pipe Trades Trust Funds, the Sheet Metal and Airconditioning Contractors National Association, the Air Conditioning and Refrigeration Contractors Association and the Air Conditioning Sheet Metal Association

hereby submit this brief in support of the Petition for Writ of Certiorari in Case No. 91-480.

INTEREST OF THE AMICI CURIAE

A statement describing the Trust Funds and Employer Associations and their interest in this case is set forth in the preceding motion requesting leave to file this brief as amici curiae.

SUMMARY OF ARGUMENT

The brief of Petitioner, Carpenters Southern California Administrative Corporation, persuasively sets forth the legal analysis as to why the express language and purpose of ERISA requires a conclusion that the statute does not preempt state collection remedies in general, and mechanics' lien laws in particular. This brief will emphasize the practical reasons why such ERISA preemption would be disastrous to construction industry trust funds and the employers who contribute to them. It will also emphasize the Supreme Court's past history in ensuring that absurd results are not reached by a slavish adherence to overliteralistic interpretations of statutes.

REASONS THE WRIT SHOULD BE GRANTED

I. CONSTRUCTION INDUSTRY TRUST FUNDS CANNOT ADEQUATELY COLLECT CONTRIBUTIONS WITHOUT THE ASSISTANCE OF MECHANICS' LIEN RIGHTS

In February, 1989, Russell Heating and Airconditioning, one of the largest heating and airconditioning contractors in Southern California, simply closed its doors, and appointed an assignee to liquidate the company. Russell owed millions of dollars to many different creditors, including approximately $2 million to two banks as secured creditors. It owed the Sheet Metal Trusts $262,575, the Airconditioning Trusts $103,534, and the Pipe Trades Trusts $27,120. All physical assets in its

shops and in the form of company vehicles, as well as all receivables, were secured. Even assuming that individual liability could be established, which is virtually impossible with a large company which is properly run (from a formal, if not a financial, perspective), the individual owners did not appear to have sufficient assets to pay off the banks and pursuit of them through litigation appeared fruitless.

The bottom line was that, as the Trusts learned by way of reports from the assignee sent in April and July, 1991, all receivables had been collected, the corporate liquidation was closed and the senior secured creditor was still owed $250,000, and no other payments would be made through the liquidation on other debts. No payments were apparently being made to the junior secured creditor who was owed $1,000,000 and no unsecured creditor would get a cent from the company's liquidation.

Despite the ominous facts set forth in those reports, the Sheet Metal and Pipe Trades Trusts had *already* been paid in full, and all but $13,000 had been paid to the Airconditioning Trusts.[1] Every cent that the Trust Funds collected came from property owners or general contractors as a result of threatened or actually filed liens. The only problem in collection was that some of the property owners or contractors raised a preemption defense under the then pending *El Capitan* case, which increased the Trusts' legal bills and delayed what turned out to be eventual payment. For example amici Sheet Metal Trusts litigated ERISA preemption in one Russell lien and the California lower appellate Court rejected the preemption claim as "black literalism". *Sheet Metal Workers Pension Plan v. Columbia Savings*, 221 Cal. App. 3d Supp.

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[1] Employees who participate in the Airconditioning Trusts do a lot of 2-4 hour service calls which are too small to lien because it would cost more to file and pursue liens than the recovery would be. Therefore, those Trusts at times are unable to effectuate full recoveries.

21, 24 (1990). Over $10,000 was collected on that lien that obviously would not have been collected had that Court not so ruled.

If not for mechanics' liens, the Trust Funds would have received nothing on this case, and probably would have still expended significant attorneys fees to discover that they would get nothing.

There are countless additional examples, and we will not bore the Court with all of the specifics, but will give a few examples. One company went out of business in February, 1988 owing the Pipe Trades Trusts $107,000. Within a year, over $101,000 had been collected through liens. The corporate bankruptcy is still open with no prospects of any additional recovery. Another company went out of business in 1987 owing the Pipe Trades Trusts over $94,000. Over $81,000 was collected on liens and stop notices.

Similarly, in April, 1988 another company went out of business owing over $120,000 to the Sheet Metal Trusts and over $36,000 to the Airconditioning Trusts. Within a few months the entire amount was paid through liens to the Sheet Metal Trusts and all but $10,000 was paid to the Airconditioning Trusts. Supposedly the balance owed to Airconditioning is to be paid off "shortly" through the Bankruptcy Court, but without interest, etc. While some of what was received through liens may have also been eventually paid through bankruptcy, it was obviously more financially beneficial to the Trusts to have had the money earning interest for the last three years.

One recent final example is also instructive. A Sheet Metal contractor was delinquent for January through May, 1991 contributions for a total of over $140,000. The Trust Funds went directly to the general contractor and told him that liens and stop notices would be filed. Immediately the general contractor began making a series of joint checks that has now paid off the entire delin-

quency. This shows that even with ongoing companies, the right to file mechanics' liens can speed up payments from general contractors to their subcontractors and ultimately the Trust Funds.

These few examples emphasize the importance of mechanics' liens to the Trust Funds and to the employee participants and their dependents who are the intended beneficiaries of the contributions. Of equal importance is the benefit *to the existing contributing employers* from the Trust Funds' ability to file and recover on the liens.

II. THE FAILURE TO UPHOLD THE MECHANICS' LIEN REMEDY WOULD ADVERSELY AFFECT THE FINANCIAL SOUNDNESS OF CONTRIBUTING EMPLOYERS

If contributions are not properly paid to ensure adequate funds to pay the promised level of benefits, it is the remaining contributing employers who must bear the brunt of any necessary increased contributions. Already reeling under the weight of the current economy and the spiraling costs of health care which are ultimately passed on to them, these contractors who voluntarily participate through collective bargaining in providing excellent health and pension benefits to their employees must every day compete against certain rival contractors who are unwilling to provide the type of pension and health benefits provided by these Trust Funds.

Small businesses such as the subcontrators who contribute to these Trusts are the backbone of the American economy. What possible motive Congress might have had to sever that backbone which contributes to the maintenance of excellent health and pension benefits for their employees (thereby reducing the strain on federal and state programs), by forcing them to compensate for the delinquent contributions of their less fortunate or less responsible competitors that have been paid in the past through liens, is a mystery.

III. PREEMPTION OF STATE COLLECTION REMEDIES FOR TRUST FUNDS IS CONTRARY TO THE PURPOSE OF ERISA AND LEADS TO AN ABSURD RESULT GIVEN THE REMEDIAL PURPOSES OF THE STATUTE

And what evil is the federal preemption of state mechanics' lien laws supposed to cure?

Developers and general contractors cannot with a straight face complain that the liens place any undue burdens on them. They deal with liens and stop notices all the time. The responsible ones all make sure their subcontractors have paid all lienable bills, including their fringe benefit contributions, before progress payments or retentions are released. Double payments by property owners or general contractors (payment in full to a contractor and then additional payment on a trust lien) are rare, and then only made by incompetent concerns.

Nothing in the language of ERISA requires such preemption. As pointed out by Petitioners, (Brief p. 18-19) many Courts had held that ERISA did not even provide a collection remedy before the 1980 MEPPA changes. Were state collection remedies preempted by NO alternative ERISA remedies? If not, were the state collection remedies only preempted by the new language in Section 515, 29 U.S.C. 1145 that employers "shall, to the extent not inconsistent with law, make" the contributions they are supposed to? Petitioners point out the brief legislative history indicating that the state remedies were not to be preempted by that language. Were those remedies already preempted by the standard preemption language in the original ERISA statute or were they only preempted when ERISA was amended to say that employers were supposed to comply with the law (including state law perhaps) and pay what they promised? The obvious logical answer is that the state collection remedies were *never* meant to be, nor were they, by any logical reading, preempted by ERISA.

Preemption of mechanics' liens certainly does not advance any of the purposes of ERISA. The section of that statute indicating that its purpose was to protect property owners and general contractors from paying the appropriate fringe benefits on behalf of the workers who build their property has thus far escaped our discovery. Similarly elusive to track down has been the statutory section establishing that ERISA was intended to ensure that Trust Funds would *not* be able to collect the contributions necessary to fund the benefits promised to the participants.

If indeed the admittedly broad preemptive language of ERISA might be read by a reasonable person to possibly encompass state collection remedies (which we do not concede and the contrary argument is well set out in Petitioner's Brief), this Court has fully recognized in the past that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 36 L.Ed. 226, 228, 12 S.Ct. 511 (1892); *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 619, 18 L.Ed.2d 374, 364, 87 S.Ct. 1250 (1967), *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 (n.20), 68 L.Ed.2d 783, 796, 101 S.Ct. 2266 (1981).

As this court pointed out in *Holy Trinity*, "this is not the substitution of the will of the judge for that of the legislator, for frequently . . . a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." 143 U.S. *supra* at 459. As this Court has also said "[t]hat principle has particular application in the construction of labor legislation . . ." *National Woodwork*, 386 U.S. *supra* at 619.

This principle has also been expressly applied by this Honorable Supreme Court to construction of federal mechanics' lien type laws (Materialmen's Act). In *Fleischmann Construction Co. v. United States Use of Forsberg*, 270 U.S. 349, 360, 70 L.Ed. 624, 631, 46 S.Ct. 284 (1926), this Court, in applying the *Holy Trinity* principles, declared that

> "The purpose of the Materialmen's Act, which is highly remedial and must be construed liberally, is to provide security for the payment of all persons who supply labor or material in a public work . . ." [2]

Similarly, in *Fleisher Engineering v. United States*, 311 U.S. 15, 18; 85 L.Ed. 13, 15, 61 S.Ct. 81 (1940) this Court noted that the materialmen statute must be given "a reasonable construction in order to effect its remedial purpose".[3]

Can any reasonable argument be made that when the broad congressional policy in ERISA of the protection of workers' health and pension benefits is combined with the broad federal and state legislative policy of the protection

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[2] The *Fleischmann* case obviously concerns a federal materialmen statute. Similarly, the California Supreme Court had previously recognized the important status of liens in California. In *Connolly Development v. Superior Court*, 17 C.3d 803, 808, 132 Cal. Rptr. 477 (1976), that Court noted that "no other 'creditor remedy' enjoys such a constitutionally enshrined status" as do mechanics' liens. The strong state interest in mechanics' lien laws is shown by the fact that they were enacted in the very first session of the California Legislature. See *Tuttle v. Montford*, 7 Cal. 358, 360 (1857). Thus, identical public interests are at stake in federal and state lien statutes as both protect the employees' benefits.

[3] Indeed, ERISA preemption of state lien remedies does not protect property owners and general contractors from *all* materialmen statutes, as such *federal* materialmen laws (Miller Act claims) are not preempted by ERISA. See 29 U.S.C. 1144(d). If lien type rights on federal public works projects are not inimical to ERISA policies, it is difficult to fathom how they are so harmful if they are maintained on state public works projects or on private works of improvement.

of workers through mechanics' liens and stop notices, the result is that the workers and the trusts that supply them with health and pension benefits are left protected by neither and without any effective remedy?

An even more unbelievable example of the irrationality of ERISA preemption of liens is that collectively bargained trust funds that are *not* ERISA benefit plans (such as industry promotion funds) may continue to file liens because ERISA obviously does not preempt their liens. Hyperbole aside, what rational person can with a straight face say that Congress knowingly intended to remove the protection of state lien rights from employee benefit plans that need it the most, when other collectively bargained trust funds (not employee benefit plans) that do not require as much protection for they have no "participants" still maintain their lien rights.

It has been said that ERISA trust funds are "something of the darlings of Congress". *Benson v. Brower's Moving & Storage*, 726 F. Supp. 31, 34 (E.D. N.Y. 1989), aff'd 907 F.2d 310 (2d Cir. 1990) *cert. denied*, 111 S.Ct. 511 (1990). Can it legitimately be argued that Congress secretly inserted a poison of ERISA preemption of state collection remedies to destroy its "darlings" in their prime? Can their unannounced and unperceived at the time subversion (through preemption) of the ability of ERISA trust funds to protect their participants and meet the Congressional goal of providing benefits to their participants truly have been within Congressional intent?

To the extent that "the language of the Act, if construed literally, evidently leads to an absurd result, . . . the Act must be so construed so as to avoid the absurdity . . . The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed." *Holy Trinity, supra*, 143 U.S. at 460. [See *FDIC v. Elefant*, 790 F.2d 661, 666 (7th Cir. 1986) statutory language "however 'plain' " shall not be

interpreted in a way which "undermines what Congress set out to achieve."]

It is time for this Court to put an end to the effort to subvert the purposes of ERISA by using it to try and destroy the collection remedies of the employee benefit plans regulated, maintained and supposedly nurtured thereunder. This Court surely must reject the argument that ERISA preempts state mechanics' lien laws for the absurdity that it is when viewed against the policy and purposes of the statute. There is simply no basis for a reasonable assertion that Congress intended ERISA to preempt such state collection remedies. Employee benefit plans, the employers who contribute to them, and the employees who rely on them all cannot be abandoned by the statute designed to protect them.

CONCLUSION

For the reasons stated above, this Court must grant the Petition for Writ of Certiorari and reverse the decision of the California Supreme Court.

Respectfully submitted,

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